

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ROY CUTLIP, ) CV F 99 5778 SMS  
Plaintiff, )  
v. ) ORDER TO THE PARTIES TO FILE  
JO ANNE B. BARNHART, ) SUPPLEMENTAL BRIEFS  
Commissioner of Social )  
Security, ) Due Date for Defendant's  
Defendant. ) Supplemental Brief:  
 ) **November 20, 2006**  
 ) Due Date for Plaintiff's  
 ) Supplemental Brief:  
 ) **December 10, 2006**

Plaintiff is proceeding with an action in which Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security denying Plaintiff's application for benefits. Pursuant to 28 U.S.C. § 636(c), both parties have consented to the Magistrate's jurisdiction to conduct all proceedings, including ordering the entry of judgment.<sup>1</sup>

\_\_\_\_ This case was previously remanded by this Court for the purpose of clarifying transferability of skills at steps four and five. In its order of remand, the Court stated:

<sup>1</sup> On March 1, 2000, Judge Oliver W. Wanger reassigned the matter to the undersigned Magistrate Judge for all further proceedings, including the entry of judgment.

1 Cutlip is correct that individuals in the 50-54 age  
2 group with limited education and nontransferable skills  
3 are generally found disabled. While Cutlip may have  
4 transferable skills, it is unclear whether or not those  
5 skills are transferable to the jobs of assembler, sorter,  
and inspector. It is further unclear whether or not these  
three jobs are unskilled such that Cutlip would be  
deemed uncompetitive for these jobs due to his age.  
As such, the Court remands the matter to clarify this.

6 (A.R. 640.)

7 On remand, the Appeals Council of the agency issued the  
8 following order on December 11, 2001:

9 The United States District Court has remanded this  
10 case to the Commissioner of Social Security for further  
administrative proceedings in accordance with the fourth  
11 sentence of section 205(g) of the Social Security Act.  
Therefore, the Appeals Council vacates the final decision  
12 of the Commissioner of Social Security in this case  
and remands the case to an Administrative Law Judge  
13 for further proceedings consistent with the order of the  
court. The Administrative Lw Judge will provide the  
14 claimant an opportunity to appear at a hearing, take  
any further action needed to complete the administrative  
record and issue a new decision. The Administrative Law  
15 Judge will also consider the finding that the claimant  
became disabled on June 1, 1999, made in connection with  
16 subsequent applications filed on June 11, 1999. All  
the appropriate records will be obtained.

17 (Emphasis added.) (A.R. 642.)<sup>2</sup>

18 Upon remand, ALJ Michael J. Haubner held a hearing on  
19 October 16, 2002, at which Plaintiff appeared and was represented  
20 by an attorney. (A.R. 572.) The ALJ had received before the  
21 hearing answers to interrogatories from Thomas Dachelet, a VE,  
22 concerning Plaintiff's past relevant work and transferable  
23 skills. (A.R. 572, citing to Exhibits 4E and 5E, at A.R. 678-  
24 688.) The ALJ issued a decision dated November 6, 2002, (A.R.  
25 572-578) in which he acknowledged that the Court's order directed  
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27 <sup>2</sup> According to Defendant, Plaintiff had filed additional, later applications for benefits on February 16,  
28 1995, October 22, 1997, and January 29, 1999, which were denied (but only one was denied by an ALJ). (Deft.'s  
Brief p. 2 n. 1, citing in turn A.R. 80-83, 17, 211-214, 84-87, 90-92, 166-74, 192-95, 196-99, 202-05.)

1 remand because the ALJ did not completely address the issue of  
2 transferable skills, and that he had been instructed to clarify  
3 whether Plaintiff had skills transferable to the jobs of  
4 assembler, sorter, and inspector. (A.R. 572.) He further noted  
5 the instruction to consider the finding that Plaintiff had been  
6 found to have been disabled on June 1, 1999, in connection with  
7 subsequent applications filed on June 11, 1999. (Id.) The ALJ  
8 considered the relevant time period to be from May 20, 1994 (the  
9 date on which Plaintiff had alleged that he initially became  
10 disabled) until May 31, 1999 (the day before the date upon which  
11 Plaintiff had been determined in the interim to have become  
12 disabled. (Id.)

13       Instead of simply receiving and considering evidence from  
14 the VE regarding the transferability of Plaintiff's skills, and  
15 further considering the subsequent finding of Plaintiff's  
16 disability, the ALJ additionally took into evidence medical  
17 records covering the period from May 3, 1995 to September 14,  
18 1995 from U.C. Irvine Medical Center (A.R. 689-731); records from  
19 Sutter Merced Medical Center from April 18, 1997 through  
20 September 13, 1999 (A.R. 733-813); a report of an internal  
21 medicine consultative examination dated November 20, 1999, by  
22 Usman Ali, M.D. (A.R. 814-17) (a report thus dated approximately  
23 six months after the period of disability pertinent to  
24 Plaintiff's original application), and an RFC assessment by state  
25 agency physician dated December 31, 1999 and consultation request  
26 dated January 3, 2000 (A.R. 818-27) (items likewise occurring  
27 seven or more months beyond the pertinent period).

28       In his decision of November 2002, the ALJ not only addressed

1 sequential evaluation step five, but he also re-adjudicated  
2 sequential evaluation steps two<sup>3</sup> as well as Plaintiff's  
3 previously unchallenged RFC, elevating it from sedentary to  
4 light. (A.R. 573.) The ALJ re-evaluated evidence that had been  
5 evaluated in the initial opinion, including the evidentiary basis  
6 of the initial sedentary RFC. (A.R. 574.) He also considered  
7 evidence emanating from time periods before and after the  
8 pertinent period. (A.R. 574-75.) He considered transferability of  
9 skills to new positions addressed by the VE based on the new RFC  
10 of light work, including a stage setting painter and railroad car  
11 letterer; he also considered the availability of of unskilled  
12 sedentary and light positions in the economy based on assumptions  
13 consistent with the new, less restrictive RFC. (A.R. 575-76.)

14 Further, Defendant noted in its brief (p. 2 n. 1, citing to  
15 A.R. 18) that the "current" ALJ concluded that the previous  
16 applications and decisions were final and that there was no good  
17 cause for re-opening.

18 The only authority cited by Defendant in its brief in  
19 support of the power, jurisdiction, or authority of the agency to  
20 exceed the scope of the limited remand directed by this Court,  
21 including considering other issues and evidence not related to  
22 the subject of the limited remand, is regulations (20 C.F.R. §§  
23 404.983 and 416.1483) and the Appeals Council's order of remand,  
24 which in pertinent part remanded the case to an ALJ for further  
25 proceedings "consistent with the order of the court," and further  
26 instructed the ALJ to consider the finding that the claimant

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28 <sup>3</sup> He did not list degenerative joint disease of the cervical spine as a severe impairment, contrary to the  
unchallenged findings of the initial ALJ.

1 became disabled on June 1, 1999, made in connection with  
2 subsequent applications filed on June 11, 1999, and that all the  
3 appropriate records would be obtained.

4 It is not clear whether the Appeals Council in making its  
5 order to the ALJ to consider a subsequent finding and additional  
6 evidence was relying on any conduct of Plaintiff, any reopening  
7 of Plaintiff's proceeding, or any other principle of authority or  
8 jurisdiction pertinent to social security law, aside from the  
9 regulation, which would make appropriate the consideration of  
10 matters such as Plaintiff's RFC, which appear implicitly to have  
11 been relied upon in the Court's decision as finally determined  
12 and not subject to challenge.

13 Defendant IS DIRECTED to file no later than November 20,  
14 2006, a supplemental brief explaining in detail its position  
15 regarding the propriety of the actions of the Appeals Council and  
16 ALJ and containing authority, beyond the regulations already  
17 cited, supporting the Appeals Council's order and the ALJ's  
18 consideration of matters in addition to the narrow question of  
19 evidence of transferability of skills with respect to the stated  
20 occupations.

21 Plaintiff MAY FILE a supplemental reply brief no later than  
22 December 10, 2006.

23 IT IS SO ORDERED.

24 **Dated: October 31, 2006**  
25 icido3

**/s/ Sandra M. Snyder**  
UNITED STATES MAGISTRATE JUDGE